In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-609

TERMINAL FREIGHT HANDLING CO., ET AL., PETITIONERS

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 444 F. 2d 699. The memorandum and order of the district court are set forth at Pet. App. A20-A23.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1971, and the time for filing a petition was extended to and including November 1, 1971. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Section 10(*l*) of the National Labor Relations Act provides that, if the Board's regional director "has reasonable cause to believe" that a charge alleging a violation of the secondary boycott provisions of the Act "is true and that a complaint should issue, he shall" petition the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." The question presented is whether, under this provision, the regional director is required to petition for injunctive relief in every case where reasonable cause is found, or whether he retains a limited discretion not to petition where he finds that the union has already ceased the unlawful activity and is unlikely to resume it.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A24.

STATEMENT

On June 12, 1970, petitioners (herein "Terminal") filed an unfair labor practice charge with respondent, the Regional Director of the National Labor Relations Board, alleging that Teamsters Local 610 ("the Union") was engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B) (Pet. App. A3; 1105).[1] After investigation, the Regional Director determined that there was reasonable cause to believe

[1] "A" refers to the appendix to the briefs in the court below.

that the charge was true, and that, unless the conduct was terminated, a complaint should issue (A. 105). Specifically, he found that the Union failed to conform to the *Moore Dry Dock* standards for so-called "common situs" picketing,[2] in that it had not confined its picketing reasonably close to the normal work area of employees of Be-Rite Delivery Service, Inc., the employer with whom the Union had its primary dispute, and it had carried signs designating Sears, Roebuck and Company, a neutral employer, as the person with whom the Union had its dispute (A. 21, 24–25).

Upon receiving notification of the Regional Director's determination, the Union altered its picketing to conform to the *Moore Dry Dock* standards (A. 105), and, on June 18, 1970, offered to enter into an informal settlement under which it would agree not to continue or repeat the acts and conduct which the Regional Director had administratively determined to be unlawful (A. 105–106, 20–26). However, Terminal opposed the proposed settlement, advancing certain contentions which led the Regional Director to conduct a further investigation of the matter (Pet. App. A4; A. 107).

At the same time, Terminal commenced the present suit in the district court, to compel the Regional Director to petition that court for an injunction pursuant to Section 10(l) of the Act (Pet. App. A4; A. 6–11). Terminal amended its complaint to seek, in addition, a declaratory judgment (1) that at all times since June 16, 1970, it was "entitled to the filing of applica-

[2] *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547, 548.

tion for injunctive relief under Section 10(*l*) of the Act against the Union and its then unlawful and continuing unlawful conduct," and (2) that Section 10230 of the Board's Field Manual, issued by the Board's General Counsel, is "unconstitutional, unlawful, unauthorized by law or statute, null and void and of no force and effect" (Pet. App. A20; A. 84).[3]

On June 29, 1970, having determined on the basis of his further investigation that the Union's picketing still had an unlawful secondary objective, the Regional Director petitioned the district court for a temporary injunction. On July 2, 1970, he issued an unfair labor practice complaint against the Union. Meanwhile, on or about June 27, 1970, the Union resolved the primary dispute which gave rise to the unlawful conduct, and on June 29 all picketing ceased. (Pet. App. A4; A. 108.) In lieu of an injunction, the district court, over the objection of Terminal, approved a stipulation between the Regional Director and the Union which

[3] Section 10230 provides:

> Where there is reasonable cause to believe that a violation has occurred and that a complaint should issue in [8(b)(4), 8(e) and 8(b)(7)] cases, Section 10(*l*) of the Act authorizes injunctive relief.
>
> Under that section injunction proceedings are mandatory; however, if it appears that the union has voluntarily ceased engaging in the conduct and a resumption thereof is not threatened, so that there may be nothing to enjoin, commencement of 10(*l*) proceedings may be held in abeyance, as our experience in the courts has demonstrated that they are unwilling to accept filings where the activity has ceased and there is no likelihood of resumption. In the latter event, injunction proceedings should be instituted if it thereafter appears that a resumption of the conduct is imminent or likely.

provided for a cessation of the alleged unlawful picketing pending a final determination of the matter by the Board (Pet. App. A4, n. 5).[4]

Terminal then withdrew its request that the Regional Director be required to seek a Section 10(*l*) injunction, but adhered to its request for a declaratory judgment. The district court dismissed the complaint on the ground, *inter alia,* that the Regional

[4] Terminal appealed from the district court's order denying it full party status in the 10(*l*) proceeding. The court of appeals affirmed the order on the ground that such status is precluded by Section 10(*l*) *and* "the overall scheme of injunctive relief embodied in the National Labor Relations Act and the Norris-LaGuardia Act," which does not give charging parties "the right to privately seek injunctive relief." *Solien* v. *Miscellaneous Drivers and Helpers Union*, 440 F. 2d 124, 130 (C.A. 8). Terminal's petition for a writ of certiorari was denied. *Sears Roebuck and Co.* v. *Solien*, 403 U.S. 905, rehearing denied, November 16, 1971.

Terminal also instituted an action in the district court to enjoin the Regional Director from negotiating a formal settlement of the underlying unfair labor practice case on the ground, *inter alia*, that Terminal had not been afforded an adequate opportunity to participate in the negotiations. The district court dismissed the action for lack of jurisdiction over the subject matter, and Terminal appealed. In the meantime, the Union executed a formal settlement agreement with the Regional Director which provides for the entry of a Board order and a court of appeals decree enforcing that order. On March 19, 1971, after having considered Terminal's objections to the settlement, the General Counsel of the Board approved the settlement and submitted it to the Board, which stayed final action pending a decision on the appeal. On November 3, 1971, the court of appeals affirmed the dismissal of Terminal's complaint. The court held that Terminal was required to exhaust the adequate statutory remedies which existed for obtaining full board and appellate court review of its objections to the settlement. *Sears, Roebuck & Co.* v. *Solien*, Nos. 20462 and 20472 (C.A. 8), 78 LRRM 2700.

Director's action in ultimately seeking an injunction made Terminal's suit moot (Pet. App. A21–A23). The court of appeals reinstated the complaint, but rendered a declaratory judgment that the Regional Director was empowered, in the circumstances here, to decline to file a Section 10(*l*) suit for injunctive relief (Pet. App. A5–A19).

ARGUMENT

The decision of the court of appeals that Section 10(*l*) of the Act does not require the Regional Director to seek an injunction where the union has ceased the unlawful conduct and it is unlikely that the conduct will be resumed (Pet. App. A17) is correct. There are no decisions to the contrary. Accordingly there is no occasion for this Court to review that decision.

Section 10(*l*) of the Act provides that, if, after investigation of a charge involving a violation of Section 8(b)(4)(B), the Regional Director "has reasonable cause to believe such charge is true and that a complaint should issue, he shall" petition the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." As the court below properly ruled (Pet. App. A17):

> We * * * conclude the "and that a complaint should issue" phrase reflects Congress' intention that the regional director retain limited prosecutorial discretion once he has made a reasonable cause determination * * *. The law

> does not and should not require the doing of useless acts. Rather than requiring the regional director to petition for injunctive relief in every case where reasonable cause is found, as Terminal contends, Congress intended that the regional director retain a limited discretion so that he would not be required to perform the meaningless act of petitioning for injunctive relief when the union has already ceased the unlawful activity and it is unlikely that the conduct will resume, nor to proceed in a case where the acts complained of are so insignificant as to be unworthy of the Board's and the Court's attention.[*]

As noted (*supra*, pp. 4–5), the Regional Director ultimately did seek a Section 10(*l*) injunction, the charged secondary conduct has ceased, the underlying primary dispute has been resolved, and the Board has under consideration the proposed formal settlement of the unfair labor practice case. In these circumstances, resolution of the issue of the Regional Director's discretion not to seek 10(*l*) injunctive relief would have no practical consequences in this case. See Respondent's Opposition to the petition in *Sears Roebuck & Sons* v. *Solien*, No. 1588, 1970 Term, certiorari denied, 403 U.S. 905, rehearing denied, November 16, 1971.

[*] The court below added, however, that, if the Regional Director, after making a "demand upon the union to cease its unlawful activity," is unable to secure cessation, "he must then petition for temporary injunctive relief and issue a complaint (or vice versa)" (*ibid.*).